UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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21-CR-080(AMD)

UNITED STATES OF AMERICA,

Plaintiff,

-against-

DOUGLASS MACKEY,

Defendant.
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United States Courthouse
Brooklyn, New York

September 11, 2023
11:00 a.m.

TRANSCRIPT OF CRIMINAL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE ANN M. DONNELLY
UNITED STATES DISTRICT JUDGE

APPEARANCES

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Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

(In open court.)

THE COURTROOM DEPUTY: All rise.

THE COURT: Everybody can have a seat.

THE COURTROOM DEPUTY: This is criminal cause for oral argument. Docket number 21-CR-80. U.S.A. versus Douglass Mackey.

Counsel, state your appearance, government first.

MR. BUFORD: Good morning, your Honor. It's Turner Buford, Bill Gullotta and Eric Paulsen for the United States.

THE COURT: Good morning.

MR. PAULSEN: Good morning, your Honor.

MR. GULLOTTA: Good morning, your Honor.

MR. FRISCH: For Mr. Mackey who is present and Andrew Frisch, good morning.

THE COURT: Good morning. Good morning, Mr. Mackey.

THE DEFENDANT: Good morning.

THE COURT: I'm just going to apologize in advance, I had laryngitis and I don't think it will affect us today, but it might.

Just a couple of housekeeping matters, there is one exhibit that we don't have and I think it's large, it's GX1005 and if you can send us that through Box.com, I think it's kind of large. I could pretend that I know how to send that, but I don't our law clerk does.

MR. BUFORD: We can handle that.

THE COURT: Okay. And at some point -- well, we can do this a little bit later, I want to get a handle on, I know I put an order on about what needs to be sealed, I have a couple of questions about the extent to those things need to be sealed as well as a few other matters, but we can do that at the end.

I don't see this as a particularly formal process, I have a couple of questions for both sides based on the submissions, and I guess we'll begin with the Brady question. I think the real question -- I have a couple of questions about precisely what the subject is but I think what I have to decide is whether material that was disclosed, I think it was on the second day of testimony; is that right?

MR. BUFORD: Some of the material was the morning of the second day and then the balance was over the lunch break, your Honor.

THE COURT: Okay. And the question is whether that was suppressed and then if it was suppressed whether there was a reasonable opportunity to use the evidence either at the trial or to use it to get additional evidence. And so one thing, it's unclear to me, I know, Mr. Frisch, that you attached I think there are 17 302s. Is it your position that all of those constitute *Brady* material?

MR. FRISCH: No, I attached all of them to be complete.

THE COURT: Okay.

MR. FRISCH: But the ones that contain *Brady* material are those the --

THE COURT: I'm just going to stop you for one minute. Are we referring to these campaign workers by their last names or -- I thought there was some question about that. Sorry to cut you off, Mr. Frisch, I just want to...

MR. BUFORD: Your Honor, we had asked that their names be put under seal. They had previously been discussed to some extent on the record by name.

THE COURT: Okay.

MR. BUFORD: I think if we maybe did first name, last initial for purposes of today's discussion.

THE COURT: Let's just -- sorry about that, Mr. Frisch. Let's just do it that way, the first name and last initial.

MR. FRISCH: Would you permit me -- so just to finish the thought, if I could. So I attached all of them just to be complete. It's not my position that they are all are problematic. The ones that are problematic are the ones cited in the draft stipulation that was submitted to the Court either -- I can't remember if the whole thing was under seal or I redacted the names, I don't remember.

So was there another question beyond that?

THE COURT: Well, can you answer that one? I don't

have your draft stipulation in front of me, so what I'm assuming is that there is Amy K. is one of them.

MR. FRISCH: That's true.

THE COURT: Then a worker with the last name beginning with a B, I think it's Timothy.

MR. BUFORD: Timothy.

THE COURT: Timothy B.

MR. BUFORD: Your Honor, I'm sorry to interrupt, in footnote five of our brief we list out I think the names of employees that are identified in the draft stipulation.

THE COURT: Okay. I think there are four of them; is that right?

MR. BUFORD: We have one -- I think there's a total of seven.

THE COURT: Okay. Well, I'll just look at the draft stipulation then.

So just to kind of lay the factual ground work, the government produced these 302s, I think I gave you a continuance to review them and suggested multiple ways to remedy, even assuming it was *Brady*. So one of the solutions was to recall the two campaign workers so you could continue your cross-examination of them.

A second remedy would be for you to call these campaign workers.

A third remedy was to have the government call them,

and the fourth remedy was to enter into stipulation. And you did enter a stipulation about Amy K.

So I still don't understand why -- as I recall your request was that I permit you to open again and then instruct the jury that the government had delayed or suppressed certain information. It seems to me in your submissions you take the position that that wouldn't have been sufficient either; is that right?

MR. FRISCH: Yes.

THE COURT: Okay. So let's begin then, putting aside the question of whether this is actually *Brady*, why weren't those methods enough?

MR. FRISCH: Well, if you'll permit me, you know, I've had obviously a number of months to think about this issue and sharpen perhaps the way I would express it -- and I'm not trying to -- I want to get to your question, I know you don't like it when I go off on tangents, I promise you if I can just this point --

THE COURT: You can make the point, but I'm just telling you and I am not being sarcastic, I am a simple person, and I like to get the answer to the question.

MR. FRISCH: I understand. But I think that --

THE COURT: You want to answer it a different way, go ahead.

MR. FRISCH: And I'm kind of a simple person

myself --

THE COURT: No, you aren't --

MR. FRISCH: Well --

THE COURT: I'm kidding. Go ahead.

MR. FRISCH: -- I think so. But I think there is something that I need -- and I know you know this, but I think that if I can set this as kind of the foundational introduction, everything else will flow from it. I'm not going to waste your time. I'm not here to say things that are extraneous.

THE COURT: I've got plenty of time.

MR. FRISCH: During the course of trial when I made a motion for a mistrial, your Honor said, well, I don't think this is *Brady* material, I don't see how it's *Brady* material. And put aside the timing of that and put aside whether materiality needs to be assessed at the end when everything is in, just put that to the side for a second, there is a general reason both why these seven 302s in the aggregate are *Brady* material and why there is no real remedy available, certainly the ones your Honor suggested were not sufficient, in my view. I did my best, I capitalized on your Honor's suggestion that we do a draft stipulation, it was rejected and I had -- I wrote a letter where I suggested some other things to which your Honor just made reference and that wasn't good. The other remedies wouldn't do the trick.

THE COURT: What if I had done that, what if I had let you open again, would you still be making this motion?

MR. FRISCH: If I had opened -- well, I think it depends. Here's -- so I'm going to put aside my foundational stuff and here's the problem, first of all, I believe the government knew -- certainly if they didn't know in March 2021 when they interviewed the first of these witnesses or the woman referred to as Amy K., sometime between March 2021 and before the start of trial, I believe they knew or should have realized that this was *Brady* material, I'll come to why. Here's the problem --

THE COURT: Did you know about her -- I recall you cross examining I think it was Mr. Cotler about her, asking questions about her.

MR. FRISCH: That's right, because her name appeared in a 302 for Mr. Cotler as someone -- and it was one sentence in his 302 and it was that one of the things she did was look at social media. I mean, I think that 302 may be part of the record and if not we can make it part of the record, and to be honest I didn't give that question much thought. I think I decided the day before or that morning I should ask him about that. I had no understanding of who she was or what her role was.

Here's the problem, putting aside my introduction, which will be helpful --

THE COURT: I think I understand -- I mean, you can give your introduction. I haven't read --

MR. FRISCH: Let me --

THE COURT: Okay.

MR. FRISCH: I want to answer your question.

THE COURT: All right.

MR. FRISCH: I know I'm -- I'm trying to be simple.

THE COURT: You're trying to be what?

MR. FRISCH: Simple.

THE COURT: Okay.

MR. FRISCH: The defense has a right to view these people for itself. I don't have to take their 302s as gospel and say I think I want to call Amy K. And I can imagine the situation where there is one piece of evidence or one witness, I think in Triumph Capital, a Second Circuit case, it was a agent's handwritten notes about a 302. I mean, I can see a smaller universe where there might be something prophylactic, if that's the right word to use in this context, that you can do during the course of the trial, but here's the problem here. Let's put aside the import of this stuff, let's just talk about the mechanics.

You have a number of witnesses, I now know it's seven but I had 17 reports to read through and think through, now months later after trial I can tell you for sure it's seven, the defense in any case like this has a right to reach

out and conduct its own examination of any of these people and --

THE COURT: I just want to stop you there. Correct me if I'm wrong about timing, but my recollection was that you rejected those remedies that I suggested fairly quickly --

MR. FRISCH: Yes.

THE COURT: -- without interviewing those witnesses.

MR. FRISCH: Well, perhaps -- so here's -- let me answer that. There's seven of them --

THE COURT: Yes.

MR. FRISCH: -- and not only do I have a right to interview them and interview what leads I might develop from them, I have a right to subpoena and try and find the various compilations or PowerPoint or Slack channels that were referred to in these reports. I have a right -- you know, one of the people referred to, who I assure you I would have to tried to reach out to, is a public figure who's identified in those 302s. He himself was not interviewed, but he was referred to as having a particular position on these memes. So I hear you.

One of the things in theory that somebody could do is adjourn the trial and conduct an investigation, interview all these people, see what they say, interview other people to whom they may make reference or to which these 302s made reference, see which of these documents are still available,

review them, and perhaps the law is that that's what a defense lawyer in that position is required to do, but I don't think that's right.

We're talking about a four-day trial where the jurors are told it's not going to be more than two weeks. We're told about this the second day of trial and it came to me inadvertently. I mentioned Amy K. in cross as an afterthought because I didn't understand how important she and everything she had to say was. And so I disagree, and I don't think it's the law, that under all of these circumstances in a short trial -- I'll get to the government what I think was deliberate suppression in a moment which is a factor here -- I don't think it's appropriate having already opened, having already spent so much time -- I promise you as an officer of the court we prepared for this trial as fastidiously as we possibly could -- and then find two days in the trial it's all, I don't want to say something that's too hyperbolic and then get caught on it, but really upset the apple cart when this should have been turned over certainly beginning March 2021 and I'll explain why, I don't think that's the law. I think it imposes an unfairness on the defense in this case and generally for that to be the law. It's restarting -- it's not the equivalent of starting from scratch, but that's an awful lot of work to have to start two days into a trial and adjourn the trial to do this when I've already opened and it should

have been turned over before. I just don't think that's the law. And I don't think I should be required or a defendant in any case under these circumstances should be required to do that.

THE COURT: So do you -- I know you cite *Mahaffy*, but *Mahaffy* is really quite different. *Mahaffy* was after two trials and the material was quite obviously exculpatory. It was -- and somebody on the prosecution's own team had told them either between the trials or at some point that they should turn this over. So *Mahaffy* is factually different in -- I just don't see many analogies, but is there a case like this where it's, I'll call it mid trial, I don't know if it counts as mid trial if it was the second day, but it was after the trial started, is there a case that supports your view that a judge under these circumstances is obligated to declare a mistrial, and I haven't even gotten to whether this exculpatory or not or impeachment material, but when you're presented by an array of options, is there a case that says that's not enough?

MR. FRISCH: There is no case that I have found where material of this sort, under these circumstances was withheld. The law is clear and it's been reinforced time and time again of late. When the government has material which it knows or should know is favorable to the defense or harmonizes with the defense, you turn it over at the earliest opportunity

so the defense can make use of it. Making use of it at the earliest opportunity -- and we'll talk about why this is important, I want to address that, why the substance is important, is not satisfied after all the time that we spent preparing this case, going through all the memes, all the chats, this was an incredible undertaking to prepare for this trial. And then to be given this stuff, which we found inadvertently and I believe was deliberately suppressed and have to start from scratch in a short trial, I don't believe that's the law. The law is clear and it's reinforced time and time again by the Courts and in DOJ training.

If it's favorable --

THE COURT: But that's sort of broad things about *Brady* in general. I'm just asking specifically under these circumstances I think Courts are instructed that the mistrial is the last and it's the most drastic remedy. I just want to make sure I understand what your argument is on the question of whether this is exculpatory.

As I understand it, the first argument is that the 302s reflect that campaign workers who were tasked with monitoring social media viewed the memes as pervasive, and so in your view that undercuts the conspiracy claim; is that correct?

MR. FRISCH: I don't disagree with that but I think there's a broader way of saying it, if you'll permit me --

THE COURT: Let me just give you the second reason and then you can tell me where I'm wrong about it, okay?

Then the second reason is, as I understand from your submissions, is that the 302s support your defense that the underlying conduct was merely intended to distract or to rile up the Clinton campaign so that they had to divert resources that it might have otherwise used for getting out the vote efforts, and that's I think the theory behind that is that certain senior campaign officials did not take the memes seriously enough to take action about them.

Do I have that right?

MR. FRISCH: As far as you've spoken it, but the context is greater. And I think what *Brady* stands for is different than -- is different and more robust than how you've expressed it, if I might. If I can just have a shot --

THE COURT: I was just trying to say what your arguments were.

MR. FRISCH: I understand.

THE COURT: Okay.

MR. FRISCH: I understand. I just want to sort of make this point and maybe I can say it better than I have previously, maybe not, but let me try.

One of things the government says in its papers in opposition is, all of this stuff is consistent with their theory, but that's not the standard. If that were the

standard, you could never have *Brady* material in a case where there is a valid conviction. In theory wherever there is a valid conviction, the government can find a way to make the *Brady* material consistent with its theory. And if that were the standard, we really wouldn't need *Brady*, because once they've made a decision to charge they can find a way to theorize, in most cases, why it's consistent.

Here's what the standard is and how it applies here. Let me just start with a more concrete example than our facts, which we're so immersed in. Two examples. If you have a witness who identifies the defendant at a lineup, but she equivocates for two hours before she does it, she may be right that that's the defendant, but the defense is entitled to know that she equivocated for two hours, or if you have a lineup and one person did not identify the defendant, for whatever reason, but two or three or four people did, you get that evidence. It doesn't mean that it's inconsistent with the government's theory it means you can't -- I always get this backward, you can't put the cart before the ox. You have to allow the fact finding process to emerge by arming the defendant with the favorable evidence or what harmonizes with the defense.

Now, you don't need a videotape of someone else pulling the trigger and killing the victim. You need favorable evidence and here's why we turn to the evidence, the

particular evidence here. And a couple of points. And there's more than just little pieces here, this is in the aggregate. This to me -- and I know you think I'm just being an advocate, but I really believe this. To me, it's mind boggling that you can't look at Ms. Rocketto's testimony and see it as diametrically opposed to the 302s they did not turn over. Remember, they reached out to Rocketto and first interviewed her, as far as we know, on the Friday before jury selection when they had begun interviewing Clinton people in March of 2021, two years before. So if it were only Rocketto, maybe these prophylactic things might work, but it's not. She said this was a big deal, those are her words. People said in the 302s using those words, it's not a big deal. She said it's so jarring you have to make a decision about what to do about this. Multiple witnesses in the 302s say that's not so.

THE COURT: I don't really think that's an accurate description of the 302s though. The 302s reflect that some people in the campaign didn't take it as seriously, but they event -- they reported it and I mean you gave the example of a lineup. To me, I think maybe the more appropriate example is if you have a bank and an employee tells the higher ups that the locks on the door don't work very well and the employer says, oh, they're fine, and then somebody robs the bank, I don't think that's exculpatory.

MR. FRISCH: I refer you to the seventh of the seven

302s referred to in my draft stipulation. The initials of the speaker are A.W. And she said, when these text by memes -- I'm paraphrasing, when these texts by memes were referred to senior and executive staff, the general approach was lackluster as though, quote, this was no big deal, question mark.

THE COURT: Why is that exculpatory? Why is their opinion of this exculpatory?

MR. FRISCH: First of all, it's contrary to what Ms. Rocketto said, number one. Number two --

THE COURT: Well, she thought it was a big deal --

MR. FRISCH: That's right.

THE COURT: -- and some people didn't, but why is that exculpatory?

MR. FRISCH: So why don't I get the people who don't think it's a big deal? Why shouldn't I get all of the other stuff which shows that people who took this seriously were mocked? Why am I stuck with the government's witnesses or the witnesses perceived by the government as favorable to them who saw this as a problem, why should I be --

THE COURT: Why is that -- I still don't understand why someone's opinion about what was going on is relevant to your client's intent.

MR. FRISCH: Why is --

THE COURT: I mean, lots of people in any kind of

criminal context could think that conduct was or wasn't criminal but that's not for -- that's not really an appropriate question for the jury, I don't think --

MR. FRISCH: Well, the government asked --

THE COURT: -- any more than having a parade of people come in here and say, you know, this is terrible.

MR. FRISCH: The government asked Ms. Rocketto those questions on their direct examination --

THE COURT: And you didn't object --

MR. FRISCH: -- and elicited --

THE COURT: -- and I stopped her. And so -- I mean, I don't think in the context of the case whatever Ms. Rocketto thinks is relevant, but then the next question is you didn't even interview these people. And I gave you -- we took some time off in the trial, you didn't even have them into interviews, so I don't know how we jump from, putting aside whether this exculpatory at all, how we jump from 302s that are turned over on the second day of trial, how we jump from there to the only remedy is a mistrial.

MR. FRISCH: So let me -- there are two or three questions baked into that, let me take them one at a time.

Number one, if your Honor sustains the conviction and this case goes to the circuit, perhaps the circuit will say under these circumstances it's incumbent on the defense attorney to stop to request the Court and the Court to grant

the request to stop the trial and conduct this kind of interview mid trial. I just don't think --

THE COURT: I basically gave you that. I said --

MR. FRISCH: And I don't think --

THE COURT: -- the government can call them, you can call them and I think there was maybe 10 minutes before you said that you didn't want to do it. So --

MR. FRISCH: Because -- first of all, the government said they would not call anyone else if I requested them, but I think -- and if this were only Ms. Rocketto --

THE COURT: Right.

MR. FRISCH: -- perhaps there is an argument that I could recall her, but this is bigger than that. These 302s -- look, we may just disagree about this, we may not reach a meeting of the minds, that can happen, but I don't believe a defense attorney should be in the position mid trial of a four-day trial when the government's had these things -- had some of them for two years, some of them more recently and they go to Ms. Rocketto at the last minute -- should have to commence an investigation and redo everything on the assumption that they can get it done in an hour or two. We're talking at the time seventeen 302s, I now believe that it's only seven. We're talking different types of documents that I have to go find and look at which are not just documents, they are memorializations or compilations or some sort of paper

based on people looking in realtime about the crime. This should have been given over long before the second day of trial because I inadvertently stumbled on it.

Let me make two other points --

THE COURT: Can I just ask you one other question, you keep saying it was a four-day trial. I think -- I don't know that I ever put that cap on it. I think that the jurors were told it was going to be two weeks. I don't think anybody ever said this trial has to end after -- I don't think it did --

MR. FRISCH: No, no. Fair enough.

THE COURT: -- wasn't it like nine days or something?

MR. FRISCH: But it's a short trial and it is, in my view, and I think it's the law that under these circumstances where something like this happens -- and I want to answer the other parts of your Honor's initial question -- you have to start investigating all this anew just because a jury was chosen. I don't think that's -- I don't think the law requires a defense lawyer under these circumstances, given all the work that we did, given the fact that we already opened, just given the prejudice of the delay while the jury is sitting there.

We spent -- I don't think it's in dispute, I think it was evident from the way we presented ourselves in trial,

Mr. Mackey and I spent so much time going through all of their Tweets and all of the memes and all of the chats which were in the hundreds and hundreds and hundreds. What was admitted at trial was a fraction of everything that's out there, and midway through the trial, whether it's two weeks or four days, that's not what this turns on, you have to upset the apple cart and go back to the drawing board and do it under the time pressure that -- while a jury is waiting. Maybe that's the law and maybe if your Honor sustains this for all the other reasons that we're seeking to dismiss the case and this case goes to the circuit, the circuit will say that's what a defense lawyer has to do, but I don't think it is.

THE COURT: Can I just ask one other question about that. I mean, jurors have to wait all the time in trials where there are delays and I'm pretty sure that I instructed them that this happens with regularity. I don't think -- I just want to make sure that we're on the same page factually about what happened. There was never any sense that the jury was sitting back there drumming their fingers. I think I gave them instructions that sometimes this happens.

So I understand your positions, speaking as a reformed trial lawyer myself, I'm well aware of the pressures that lawyers face when they are on trial, but this is what I'm trying to get at is -- and I think some of these arguments you have formed since that time, I'm not sure -- I mean, I told

you could, that you could make new arguments about it. I recall at the time the trial, for example, you didn't think this was intentional, now you do, and I don't really think there's much point in going into that. I don't really -- I guess they can say it was not intentional --

MR. FRISCH: Let me --

THE COURT: -- and you can say it was.

Go ahead, if you want. Go ahead.

MR. FRISCH: Again my --

THE COURT: I'm confusing you.

MR. FRISCH: There is a queue of airplanes in my head waiting to take off, so let me deal with the first one and then I'll get to that.

Why is this important? Why are the opinions -- as you call opinions, why are these 302s, why should they have been put turned over, putting aside what I believe is deliberate misconduct.

First of all, the crime is being, essentially, the crime or the conduct constituting the crime whether, it's by Mr. Mackey, is being surveilled on a daily basis by people with the savvy, the expertise and the motivation to understand what it is, analyze what it is and evaluate its effect. And that wasn't turned over to the defense, that's number one.

Number two, there is kind of a hodgepodge of different verbs and adjectives and descriptions of this in the

Clinton 302s, that's kind of the point. Because the election of 2016 was different in this regard because of social media, forgive me, because shit posting was kind of a new concept at the time and why is it fair for the government to withhold the fact that Clinton people are trying to get their arms around what this is and what it means and whether it's a conspiracy or not and whether there's intent or not. That's exactly where Mr. Mackey was. This is happening for the first time, and so to withhold from the defense this confusion or this varying of opinions or this uncertainty about what it all means, to withhold that from Mr. Mackey and then hold him to a standard that he knows what this means, that he understands the certainty of it, strikes me as another reason why it should have been turned over.

THE COURT: And then you did have a stipulation. Your position is that wasn't sufficient; is that right?

MR. FRISCH: That is correct. And I'll come to that in a second, if I could.

THE COURT: Okay.

I mean, you can't make people stipulate so...

MR. FRISCH: No, and that's right. Look, I offered a stipulation because your Honor said maybe the parties can work out a stipulation, so I drafted a stipulation, they rejected it. When we agreed to a certain language, and this is page 819 of the record, I said, look I'll take -- I think

I'm paraphrasing myself but I said, I'm going to take advantage of the two sentences to which they'll agree, but it doesn't address all the problems. I said that.

THE COURT: Well, there is clearly some things in those 302s that were not helpful to you that you didn't want in the stipulation.

MR. FRISCH: And that's what *Brady* doesn't require.

THE COURT: Right, but I'm just saying --

MR. FRISCH: I agree with you, I agree. I did the best I could to put up a stipulation and they said we're not going to stipulate. This is why this should have been given over in advance so we're not haggling about the language of the stipulation. Everyone's armed with the same facts and we have it out in front of the jury.

The government spends a lot of its papers explaining the consistency of their view with these 302s. The time to do that is to arm the what -- after the defense is armed with this stuff, make your arguments in front of the jury. Maybe you'll have a sufficient case. But to put the defense at this disadvantage, all the time we spent preparing, knowing -- and I want to come to this, I want to spend time on this -- knowing that they should have turned it over and that calling Rocketto was with the hope that we'd never discover the rest, is not the way to do it. And it's --

THE COURT: Why would they turn it over at all?

MR. FRISCH: Because --

THE COURT: Maybe my imagination isn't good enough, but if you attribute the worse motives to them, why turn it over at all?

MR. FRISCH: Because when I mentioned her name on cross, when I mentioned Amy's name on cross they turned it over, they turned over just her 302s and made no mention of any others. And I put that in a sworn declaration to the Court. I seriously --

THE COURT: No, I know it. They conceded --

MR. FRISCH: Let me finish. Let me finish.

THE COURT: They conceded. Well, no --

MR. FRISCH: They turned it over because --

THE COURT: But get to the point here. They turned it over, then you requested additional materials which they gave you.

MR. FRISCH: We'll come to that. The reason they turned it over -- I did their job for 11 years. I was in the public integrity section, among others. They turned it over because they knew -- and I'll back this up, they knew that if I reached out to her and -- or an investigator reached out to her and found out she had been interviewed the first time in March 2021, to paraphrase Ricky Ricardo, they'd have "some splaining to do." So they turned it over, and just those two, to sort of forestall that and then at that lunch break I

requested any others that they had, and that's when we got the rest of them.

I want to talk about -- and I want to make this point and -- because I did say during trial, I think during a sidebar about the Tweets, Microchip's Tweets, I did say these guys have been good to work against. I'm not manufacturing indignation about this and I want to talk about that, about why I believe this is one of the dispositive factors here and why it is intentional.

There can't be -- we can't -- and I want to say this respectfully and I've tried to be as careful about this as I can, notwithstanding how it may appear, we can't have what I call inference by seating chart.

THE COURT: What does that mean?

MR. FRISCH: I'll explain. We can't draw inferences from dissembling or a coverup or false statements or misleading statements or misrepresentation by omission based on where your chair is in the courtroom.

THE COURT: Who does that? No one does that. Are you saying that I do that?

MR. FRISCH: No, I'm not saying you do that, I'm saying that if the inference -- if we draw inferences against defendants generally, I don't mean this case and I don't mean your Honor, if we draw inferences against defendants, and we do it all the time, when they lie -- I don't mean Mr. Mackey,

I mean generically, if you lie, if you're a defendant and you lie or you cover up or you make a false statement, the fact finder is entitled to draw inferences against you. But if you sit on that side of the room and you're making false statements about the production of these 302s and there's multiple of them -- and we'll get to Microchip later if we have time, you have to understand why they're doing that. Why did they say, well, we heard Mr. Frisch's opening and so we decided to let him -- give him these two and let him know about the others. There's multiple false statements baked into that statement. And the rules of inferences of misconduct don't just exist in this courthouse -- I'm not talking about your Honor or Mr. Mackey, for people who sit on this side of the room.

They had to have understood -- this is conspiracy case there is someone -- there's a witness who is saying it wasn't seen as a conspiracy, they had to have known -- you have discovery where Mr. Mackey repeatedly touts himself as a shit poster, including after November 8th when he says this was the shit posting election. I'm not saying that's dispositive, but it has to put them on notice that what they're hearing from these witnesses is exculpatory. And the fact -- and here's why Rocketto was important in addition to what I've said. The fact that they reached out to Rocketto at the last minute, whether it's admissible or not, and they

elicit evidence contrary to the words in the 302s they're not turning over, should indicate that they know that they had to turn it over. The fact that they gave me the Amy 302s is to create plausible deniability in case -- oh, we gave you the Amy 302s. As soon as we heard the opening statement we knew you wanted it, well that's not what happened. That's not what happened. It wasn't opening statement, it was after I mentioned her name.

Look, I want to say something else about this, and this is why -- and this is important, everything I say is important, but this especially important. It's difficult enough to be a defense attorney in any case, but defense lawyers are not fraud examiners. We all have to presume prosecutorial candor and transparency and integrity. We have to assume that what we're hearing and what we're getting and the way the cases are prosecuted are on the up and up. We can fiercely disagree about what inferences to draw from the facts, but a defense lawyer can't be sitting here on this side of the room thinking what are they hiding, how are they defrauding me.

It took me -- and Mr. Mackey and I had an ongoing conversation about this after the trial, it took me a while to think -- first to have the complete record, but also to think through all the conversations I had from the beginning with them. And how this is so plain to me, it became plain to me

that this was deliberate, that they understood -- and if you look at the deceptions about Microchip and you look at these deceptions it's all about either making affirmative misrepresentations or affirmative omissions about whether or not there is a conspiracy. Whether or not Mr. Mackey -- I don't mean to say whether there was a conspiracy, but whether Mr. Mackey participated in a conspiracy, knew that there was one.

THE COURT: Let me go to this question of Microchip because I'm unable to find an opinion, and maybe because I just haven't looked hard enough, but are there any other cases applying *Brady* analysis to an application like this?

MR. FRISCH: Yes.

THE COURT: So just timing wise, the government applied to have the witness testify anonymously. Judge Garaufis ruled, I think on March 8th, and the Jencks disclosure about Microchip is March 10th, and you clearly cross examined Microchip on this.

MR. FRISCH: Hundred percent.

THE COURT: Did you go back to Judge Garaufis to ask him to revisit the question of whether Microchip's credibility affected whether he should be permitted to testify anonymously?

MR. FRISCH: I did not. And I shouldn't have to and here's the reason --

THE COURT: But I mean --

MR. FRISCH: Let me --

THE COURT: No, I -- you keep --

MR. FRISCH: -- you're --

THE COURT: -- saying you don't have to do it, but I just don't --

MR. FRISCH: With --

THE COURT: First of all, I don't understand what the witnesses' credibility has to do with -- I mean, presumably informants have credibility issues all the time, cooperators have credibility issues all the time, but what does the witness' credibility have to do with deciding whether or not the person should be permitted to testify anonymously, whether there are considerations that outweigh the right of the defendant to ask in his name, and also to be clear I think you had the identity for attorneys' eyes only; is that right?

MR. FRISCH: I knew his identity independent of the government.

THE COURT: And these are -- we're talking about public Tweets that he posted, the things that you say are *Brady* are things that he said about himself, right? I've just never seen --

MR. FRISCH: I'm trying --

THE COURT: -- *Brady* applied in this context.

MR. FRISCH: I think your Honor's framing of the

issue -- I disagree with the way your Honor has framed --

THE COURT: Okay.

MR. FRISCH: -- the issue and I disagree with the language you're using.

You have to take a step back. We may just disagree, I get it, that's what happens.

THE COURT: It's not that, it's just that --

MR. FRISCH: Well, let me try.

THE COURT: Okay.

MR. FRISCH: Let me try.

THE COURT: Okay.

MR. FRISCH: I'm not, I'm --

THE COURT: I take the argument about Microchip to be part of your deception argument as opposed to some independent issue that the government is required to give all of its Jencks material over before making the application. I'm not aware of that rule.

MR. FRISCH: There is no such rule, and you're missing --

THE COURT: I'm missing what?

MR. FRISCH: -- with all due respect I think you're missing the point. You can rule against me and we'll have it out in the circuit if so, but I, respectfully, think you're missing the point.

When the government makes an application to a judge,

whether it's Judge Garaufis or you or anyone else in this building or in this country, you cannot withhold from the judge what they know, whether they know it from the February 2023 Tweets, which they told him to stop two days before they made the motion, or -- and/or they know it from the 302s.

When they went to Judge Garaufis and they made the application for his anonymity, they knew and did not tell Judge Garaufis that Microchip had told them or -- and they otherwise had reason to know, he's an addict, in his words he's crazy and insane, that's just not on the February 2023 Tweets, and that he wanted to work for them because it gave him structure, because he was either an addict or crazy and he was scared, not necessarily because of reprisals, physical reprisals from the political world, but because it would affect his self employment if it sullied his reputation.

So you're right, I think, and I wouldn't disagree, that Microchip was effectively cross-examined, but for two things. Number one, his testimony laid the ground work for admission of co-conspirators statements. Without him -- I don't think there was an adequate basis, with due respect, to admit as many of the co-conspirator statements as your Honor admitted, but certainly without him there's no basis at all, and so however I cross-examined him has nothing to do with whether or not he should testify. But here's the bigger

issue --

THE COURT: Can I just ask you one other question, it's just because we lose the thread. For *Brady* you have to show that the result would have been different. Is it your position that Judge Garaufis would not have granted the government's application for the witness to testify anonymously if Judge Garaufis had known when he made the ruling that the witness had posted these things on which you cross-examined?

MR. FRISCH: Here's my position.

THE COURT: Okay.

MR. FRISCH: When there's prosecutorial fraud, all bets are off. You may be able to fix it, there could be a case, for example -- I'm just hypothesizing, where there are eight undercover buys and the government is not being truthful about one of them but still has seven, but when the government does what it did here with regard to that application for anonymity, and they are not telling the judge all the facts that are in their possession, one way or the other or both ways, that's a fraud on the Court. And we do the system a disservice and we encourage shenanigans if we just try and parse how or whether the judge would have ruled differently, that's number one.

And number two --

THE COURT: Doesn't *Brady* require me to do that

though? Doesn't *the Brady* -- assuming *Brady* even applies here, doesn't that require me to determine A, whether there was exculpatory material withheld on an application to permit a witness to testify anonymously which is one question, but I think you still have to show the result would have been different.

MR. FRISCH: Well, the result is that he testified. We do not know that he would have testified had anonymity not been granted, and your Honor predicated admission of co-conspirator statements on his testimony.

THE COURT: Right. But just this one specific question. Are you saying that Judge Garaufis would have ruled differently if he had known when he made whatever impeachment material was out there about the witness.

MR. FRISCH: I think there is a reasonable probability in this context that the entire tenor of the argument and Judge Garaufis' approach could have been different. I don't have to get into Judge Garaufis' mind nor would I ever do so and tell you how he would or would not have ruled --

THE COURT: So then --

MR. FRISCH: -- but I will tell you there's a reasonable probability that things could have been different.

THE COURT: So didn't you then have an obligation, when you got this material two days after the decision, to go

back to Judge Garaufis and say, your ruling would clearly be affected by this, I'd like you to reconsider it.

MR. FRISCH: Frankly, there's two answers to that.

THE COURT: Okay.

MR. FRISCH: Number one, where the prosecutor engages in what I consider to be prosecutorial fraud, I get to cross examine the witness before I call all this out and get the advantage of revealing who he is, that's number one.

Number two -- and this is really important and this goes back to what I started to talk about.

THE COURT: Just explain what you mean by that. You get the advantage.

MR. FRISCH: I chose to cross -- when you have a -- we may disagree as to the foundation --

THE COURT: I don't understand what you said. You said --

MR. FRISCH: I understand that. Let me just finish. We may disagree about the foundation as to whether or not there's a fraud here on the Court. We may disagree on that and if we do, a lot of -- your Honor may have -- may rule a certain way than not, I get it.

But -- listen, I've been trying to make this point now for -- in -- for a couple of -- before -- I just said during the course of the trial this guys were good to litigate against, I said it on the record. Before I stand up and argue

that I know that I'm right, that something has changed or that I think the judge was deceived or that he wasn't given the full picture or that there's not really a basis to revisit the ruling, I have to be sure in my mind, every defense lawyer has to be sure in his or her mind that before you make such argument that you feel confident about it. And before it wasn't until time went on that I felt comfortable and confident saying what I'm saying in my papers and saying what I say now.

Might I have said to him, wait a minute, what's going on here, the government didn't tell you this. I might have, but I don't think I was required to do so because I have -- before I stand up in a court and say I think there's a real problem here, I think it's monumental, it effects Mr. Mackey and it effects the way we conduct cases in this circuit, I have to be confident about it. And I will -- and I mean nothing -- I want to say this carefully because it involves a matter under seal, but even with regard to the matter that we discussed in the sealed proceeding, your Honor evinced a certain point of view about that even as to that one fact. So if the answer is, when you see this, you have to go right at it and you have to call attention, and whether it's prosecutorial fraud or not it doesn't matter, then to the extent your Honor is making a point in your question, that's the answer, but I don't think it is.

THE COURT: So again, your view is, I think I understand this now, that there's just been this systemic fraud on the Court and because of that the usual rules that might apply, like so for example, let's say that there was no, what you say, intent to defraud the Court in connection with that application to Judge Garaufis, if you saw -- if you saw these Tweets -- I, frankly, don't know the substance of what was turned over, you said you found out things about him independently, but you think because this was just such a systemic problem that that relieves you of an obligation that you might otherwise have to alert Judge Garaufis to what you think would have changed his decision, and I want to make sure I understand because, generally the *Brady* analysis does require if you find a violation, you also have to show that the outcome would have been different --

MR. FRISCH: Well --

THE COURT: -- and when you have the judge there available to present the material that you claim is exculpatory, it would have given Judge Garaufis the opportunity to revisit his judgment if he thought that was appropriate. And that's all I'm asking. I'm -- you keep acting like I'm -- you know, you keep speaking in broader terms, I just want the specifics.

MR. FRISCH: First of all --

THE COURT: You're saying that this is such a

systemic problem that that general requirement to show that the outcome would have been different is not the prevailing consideration, it's protecting the system from, you know, prosecutors who willfully sit on exculpatory material.

Do I have -- is that right?

MR. FRISCH: In -- in the main, but I would tweak it a little bit. Number one, the standard isn't it would have been different, the standard is whether a different outcome is a real enough possibility to undermine confidence in the verdict --

THE COURT: Precisely.

MR. FRISCH: -- and of course here we have a deadlocked jury --

THE COURT: We didn't have a deadlock jury --

MR. FRISCH: -- who required an *Allen* charge.

THE COURT: Oh, I see what you mean. I see. We did have a verdict though.

MR. FRISCH: We're here, so we did.

Second, I just want to remind your Honor that the government didn't respond to this in their papers, maybe they will today. But when we approached to discuss my ability to cross examine Mr. Microchip about those Tweets, your Honor said something like, oh, they've seen them. I hadn't. I found them. I'm not complaining, I found them. They didn't turn those February 2023 Tweets over even though two days

before they made their motion to Mr. Microchip they said stop tweeting to Mr. Microchip. The Tweets that I cross-examined him about, I found those independently without the help of the government.

THE COURT: Well, I mean but that's not *Brady* material. I mean, it might be helpful for your cross-examination but it's not only within their control if you're going on, if you're doing a Google search --

MR. FRISCH: With due respect, I think you're looking at it too narrowly.

THE COURT: Okay, that's *Brady*? What somebody writes on --

MR. FRISCH: No, no, no, no.

THE COURT: -- on the chat room? Okay.

MR. FRISCH: If you're a prosecutor, if you're prosecutor, a federal prosecutor and you are making an application to a judge as to why this person needs to be anonymous, you better be sure you're telling the judge all the information that's relevant to that, whether it's the Tweets or -- and/or whether it's the 302s, you better make sure the judge knows the whole landscape. Maybe he'll reach the same result, maybe he won't, but it is going to be a different discussion. And this is precisely why what commentators talk about and the case law talks about. Because when you get away with it, you're in this position where you're arguing to undue

something as opposed to having a fair fight armed with all the information at the relevant time.

That goes for the anonymity and the Clinton 302s. All of this should have happened initially before Judge Garaufis and, second, before the jury. And under these circumstances sometimes Mr. Defense lawyer, Ms. Defense lawyer, you could have fixed this, that or the other thing, I don't remember what language you just used, but there is so much here that just undoes what is an unusual case -- and I hope we'll have time to talk about insufficiency of the evidence and insufficiency of venue, it's on that record that we're talking about these things. And I submit that the reason these things happened, it didn't happen coincidently, it wasn't an oversight, it wasn't my dog ate it, it's because the government realized there's problems with this case, a high publicity case and the only way to get to the promised land was to do what they did. And if the evidence were stronger, if there eight undercover buys, and we're talking about one or whatever metaphor you want to use, that's one thing, that's not our case.

THE COURT: Can I just ask you, then, if I were to -- like I said, I'm not aware of any case that requires the government to turn over Jencks material before they make an application for a witness to proceed anonymously, but assuming that's not currently the rule, sounds like I would be breaking

new ground -- I wouldn't?

MR. FRISCH: No. Prosecutors have a duty of candor to the Court. This isn't about technical timing of disclosure of 302s, it's about making --

THE COURT: I'm talking about the Microchip.

MR. FRISCH: I am too, I am too. It's about making an application to a federal judge and not telling that federal judge all the facts that you know about. They didn't have to give over the 302s. They could have summarized them and put them in the substance of their motion.

THE COURT: I'm just talking about Microchip right now. There's no 302 with Microchip, is there? Oh, there are. Sorry about that. Okay.

MR. FRISCH: The point --

THE COURT: But the only thing I'm asking is, as far as I know you haven't cited it, there's no case specifically relating to the obligation when you're making an inquiry about anonymity, which has specific factors for the judge to consider. I don't recall that the witness' credibility is one of those factors. So it sounds to me as though, if I were to make this ruling that I would be perhaps establishing a new standard for them. You're saying it's not. You're saying this falls under the umbrella of candor to the Court about everything, which means that they had an obligation before they made the application to turn over all the material about

the witness.

MR. FRISCH: They didn't have to turn over the 302s before they made their application to Judge Garaufis.

THE COURT: Okay.

MR. FRISCH: What they were obliged to do is tell Judge Garaufis the truth.

THE COURT: About?

MR. FRISCH: They were -- about the reasons about who Mr. Microchip was, what he told them, what they knew he told them was the reason why he wanted anonymity. Remember, it isn't just the fact that the real reason for anonymity was not as they -- certainly not as completely as they represented, but they also told Judge Garaufis that Mr. Microchip and Mr. Mackey had direct conversations about these memes; they didn't. So -- and they knew that when they made the application.

I'm not asking you to make any new law about the timing of 302s or what necessarily needs to be in a motion for anonymity, I'm asking you to require the prosecutors be honest and fulsome when they make any application to a federal judge, anonymity or otherwise.

THE COURT: Okay. So it's 10 past 12, we've been going for an hour and 10 minutes and your adversaries haven't had a chance to say anything, so I'll hear from you, first of all, on the response -- let's start with the -- well, where

would you like to start?

I think, as I understand it, the application is based on sort of an overarching failure to live up to your ethical standards as prosecutors, which is a very serious accusation, but it is in the context of the Clinton campaign staff about turning those over and also with respect to your application to have the witness testify anonymously.

MR. BUFORD: We're happy to start wherever the Court would like to direct us. Suffice it to say, our view is that we complied with our discovery obligations and did not act in bad faith throughout this process.

I guess with respect to the Clinton 302s, we start from the premise that it's not an element of the charged crime for the government to prove that the opposition campaign had any particular reaction to the actions of the defendant, or even that they were aware of them. That I think distinguishes virtually all of the *Brady* cases that are cited in the defense papers where the information goes to some critical element of the charged crime such that it would have relevance.

I think the internal deliberations and machinations of Clinton campaign, as they were trying to decide whether and how to respond to misinformation, is categorically irrelevant, as your Honor ruled during the course of the trial and alluded to earlier today. The analogy of the locks on the bank, it is Hornbook law that the negligence of the victim is not a

defense, even if you accept in our view the dubious proposition that the Clinton campaign is somehow a surrogate victim here.

There are certain facts that are not in dispute and were disclosed by the government I think in multiple different ways before the trial, which is that misinformation was spreading across the internet, in chat rooms and social media prior to the defendant's tweeting about it, and that the Clinton campaign observed that misinformation, not the defendant's Tweets because they responded before the defendant tweeted and took action. Those two facts might be relevant, but again they were disclosed by the government in multiple different ways before the trial to include the 3500 of Lloyd Cotler, which references some of the Clinton campaign staffers that were involved by name and describes that it was their job to monitor some of these social media websites. And to the extent those facts were deemed relevant by the defense, they were available to them, or to use the language of the doctrine, the defense was on notice of the essential facts that they might want to use for their defense.

To your Honor's point, again, the two facts that memes were pervasive and that the underlying -- that the senior officials observed it, those facts were disclosed and also the subject of the stipulation that we put in because the defense thought that it would be important to have those facts

before the jury to the extent the evidence didn't organically establish them already.

And with respect to the notion that the defense inadvertently stumbled upon this information, to be clear, Mr. Paulsen disclosed these reports to the defense unilaterally the morning of the second day of trial. I don't know that this point is significant, your Honor, but we will represent to the Court Mr. Paulsen's memory is that he orally advised Mr. Frisch there were additional reports that he could have if he wanted them. This is not to say that anyone is misrepresenting anything. Mr. Frisch doesn't remember Mr. Paulsen saying that, but I remember Mr. Paulsen telling me shortly after he turned them over that he orally advised Mr. Frisch as such, but I don't know that it's ultimately significant, but all the reports were disclosed by lunchtime that day.

And again, to the extent beyond the sort of two core facts, to the extent the defense is interested in sort of the internal thinking of the Clinton campaign that some staffers didn't react as rapidly as other staffers might have wanted, that just strikes us as categorically irrelevant. There's no latches defense in a crime, even if you were to put the Clinton campaign in the shoes of a victim here.

And we certainly think the government didn't make any false statements with respect to the 302s. The Court may

very well determine that they should have been turned over sooner, but they were turned over and we didn't lie about them.

THE COURT: What's your position about -- I mean, I think -- I think one -- I was looking at the record, I also think one of the things that I suggested that could be done is directing the government to call the witnesses, which I think was not something Mr. Frisch wanted done. I think that was one of the remedies that I suggested.

What about this issue of the application to Judge Garaufis?

MR. BUFORD: Your Honor, if the Court will permit, Mr. Gullotta would like to speak to that.

THE COURT: Sure.

MR. GULLOTTA: Thank you, your Honor. I think the Court has already zeroed in the fatal flaws of that argument made by the defense. The attempt to sort of conflate *Brady* jurisprudence with the government's obligations in its application to Judge Garaufis.

The Court is well aware, the defense is well aware, Judge Garaufis had to perform a balancing test and determine first whether or not the government had provided evidence that there was a legitimate concern for the defendant potential harassment, retaliation, annoyance were he to testify and give his true identity at trial. That evidence was produced to the

Court and the Court determined that there was a real nonspeculative concern of that.

The second part of the analysis is whether the witness' true identity has any materiality to the determination of guilt or innocence at trial. And as everyone knows who has followed this case, Microchip used that pseudonym at all times. He communicated with his co-conspirators under the name Microchip, he communicated with the defendant under -- in the chat rooms and elsewhere under the name Microchip and never used his true identity, so the defense was unable to meet its burden to demonstrate that his true identity was material to guilt or innocence in any way.

What has been cited in the post-trial briefing is impeachment material, which was provided to the defense well in advance of the trial and the defense used to impeach the witness. It has absolutely nothing to do with the anonymity analysis, with the confrontation clause analysis. We didn't tell Judge Garaufis what Microchip's favorite color was either because it has nothing to do with the analysis.

THE COURT: I don't think that's what counsel is saying. I think what he's saying is, if there is material there that suggests -- I think this is right, I'm positive Mr. Frisch will tell me if I'm wrong, but I think the claim is that perhaps there is something in that material that undercuts his concern about retaliation.

MR. GULLOTTA: No, I don't think that's the position he's --

THE COURT: That's not your position?

MR. FRISCH: It is my position and there's other reasons --

THE COURT: I don't think that was something you argued in the brief, but I could be wrong about that. But I think I understand your point. Go ahead.

MR. GULLOTTA: Let's look at what he did cite in the brief. Microchip used drugs twenty years ago. That he had debts owed to the IRS. That he made comments about whether or not there was a grand plan when they were conspiring. That he worked with the government. None of that has anything to do with either of those two parts of the analysis, so that's why I say no, there's nothing in that information that affects whether or not Microchip had a concern about his safety, about retaliation or annoyance or whether or not his true identity had any materiality to guilt or innocence. None of that is relevant to the analysis and that's why it wasn't a part of it.

And it's worth mentioning, 99 plus percent of the Microchip Jencks was produced years ago. It's the Twitter statements, it's his DMs and things like that.

On February 13th, the government notified the defense that Microchip was the cooperating witness so the

defense knew as early as February 13th that if went and looked back at everything Microchip said, that's Jencks as to the government's cooperating witness.

Some of what was in his DMs and public facing Tweets was vile, antisemitic, racist, misogynist, that's all information the defense knew before the government filed its motion seeking protective measures.

If the defense's position was that Microchip would be embarrassed if his true identity were associated with his name, they had all of the ammunition they needed to make that argument before Judge Garaufis, because they knew all the horrible things that Microchip had said, which for whatever reason never really came out on cross. So none of what the defense pulled from the 302s that were produced after Judge Garaufis' ruling relates in any way to the analysis that Judge Garaufis had to perform in order to determine whether or not to grant the government's motion.

As the Court pointed out, even after we produced those 302s, again well in advance of trial so they could use them as impeachment material, the defense did not say, hey, Judge Garaufis, you should have known this, I'm here to tell you now this will effect your analysis.

The defense likewise did not raise that with your Honor prior to Microchip's testimony. And the reason for that is because this information has nothing to do with that

analysis and it knew that the Court, whether Judge Garaufis or your Honor upon hearing that information, would reach the same conclusion. The best thing to do is to grant --

THE COURT: I think what about the larger point that Mr. Frisch is making that I think he has taken the position now that these were all intentional efforts to withhold material information and I'm not sure that I think the argument is part of the larger argument that systemically there was something wrong with this trial, and what's your response to that.

MR. GULLOTTA: Well, with respect to the Microchip information, the argument doesn't make sense and I think Mr. Frisch is tying himself in knots trying to answer the Court's question, because it's only misconduct if there was some duty to tell Judge Garaufis this information and there wasn't because it's completely irrelevant.

There was a duty to provide it to the defense so that they could impeach Microchip with it and we did that. There is no claim that we failed to meet our *Brady* obligations with respect to Microchip.

What the defense is trying to do is import some *Brady* obligation to Judge Garaufis in the context of the confrontation clause analysis that he had to perform upon receiving our motion, and the two things don't mesh. There was no obligation to provide impeachment material to Judge

Garaufis unless it impacted either of those parts of the analysis, the potential for him to face harassment or the materiality of his true identity, and none of this information is in any way relevant to either of those two things.

THE COURT: I don't know which one of you wants to answer this, but what about Mr. Frisch's point that, you know, he spent all this time preparing for the trial and finding out about these, I think we'll agree the disputed 302s there are seven of them -- how many pages are we talking about there? Are they maybe 30 pages, between 20 and 30 pages approximately? I mean -- and I don't think that's so important as what he's saying is the content of those just completely upset his defense and the trial and all of that and he shouldn't have to, even though the Court offered some curative approaches, he shouldn't be required to accept any of them because you should have turned it over earlier.

MR. BUFORD: Your Honor, again, I think what we would say is that the contents of the reports track the kind of undisputed factual chronology that the government had disclosed well in advance of trial. So I don't know that it requires the kind of wholesale revisions or bombshell revelations that Mr. Frisch is describing now.

Again, the government's proffered evidentiary presentation that it put on, was that misinformation was spreading on the internet prior the defendant's Tweets, the

Clinton campaign observed that misinformation on the internet and social media prior to the defendant's Tweets. The Clinton campaign took action to put in place a corrective plan prior to the defendant's Tweets, and the two Clinton staffers the government did call, as I think the Court observed at the trial, didn't offer their freestanding opinions about whether these Tweets were good, bad or indifferent. They just described what they saw and the response that they put in place. That's why they were called to testify as opposed to the others.

So the fact that, as the Court said, there may have been some discussion internal to the Clinton campaign to which the defendant was indisputably not privy about how to respond to misinformation generally, and even maybe this misinformation specifically, doesn't have any legal significance.

THE COURT: What about his claim that uncertainty or -- I'm not sure, I think some of the content of those 302s reflected that some of the senior people were less technically savvy than the -- maybe that's not right, but what about his point that well, in his notice claim he says that Mr. Mackey didn't have fair notice that he could be prosecuted under this statute and -- that's really not a jury question though, I mean, that's more of a legal question, but I think that's the argument that if people on the campaign didn't think it was

important, does that go to his intent.

MR. BUFORD: We certainly don't think it goes to his intent, your Honor. Again, there is no suggestion that anyone on the campaign was in direct communication with him or a percipient witness to his own thinking somehow about how to do this. I think, as I understood it, the argument from the defense was, something like, well, social media and its impact on the election was all kind of new, and this was uncertain terrain for everybody and to the extent the Clinton campaign was trying to figure out the appropriate response to misinformation somehow that might be relevant. Again, your Honor, we just don't see how that could be because it's not an element of the crime.

I also think, for what it's worth, your Honor, that that somewhat mischaracterizes the nature of the reports. Where at least all of the people who were interviewed by the government I think expressed concern about the effect of misinformation and concern that it could confuse voters and the challenge is how to respond to it in realtime without accidentally amplifying it by calling attention to it as you come down the stretch. And that's the other thing I think the interview report shows in context, the campaign is it's crunch time, it's frantic. Every minute, every dollar is precious at this point and the question is where to allocate resources, and I think there is a strong flavor of that in the reports.

But whether --

THE COURT: Well, that's his other defense is that all he was trying to do was rile up the campaign, although I'm not sure that those two things are mutually exclusive.

MR. BUFORD: Well, your Honor, if that is the defense, the government's own witnesses testified about that defense. They described the actions that they took in response to this and if the defense was, they took the bait, this is a triumph, that Ms. Morales Rocketto was duped into believing this was a serious attempt to fool voters and wasted her otherwise precious time responding to it. That defense came out on the direct examination of Ms. Morales Rocketto who said exactly that.

THE COURT: All right. As I said, I have paid careful attention to everyone's position, I just wanted to make sure that I understood.

There are two other issues that are addressed. The venue issue, I understand your position, I don't think -- I think I get what you're saying. Are you saying that with respect to venue that it should have been prosecuted I guess in the Southern District?

MR. FRISCH: It could have been prosecuted in the Southern District, yes. If I can talk about venue, and I'll be brief, but I think this is really important. And I don't mean -- I shouldn't be as loquacious on this as I would like

to be, but let me make this point about venue.

At page 19 of Judge Garaufis' opinion on venue, which I think is docket 54, he said the government needs to -- I'm paraphrasing -- and this isn't the only thing he said, it's 50 -- it's a lengthy memorandum. But he said in substance, the government needs to prove that the images were viewed in the Eastern District. Essentially he was denying the pretrial challenge to venue with an understanding the government could introduce evidence at trial greater than what was in their particularization and so forth; they didn't. The government did not prove that anyone saw the particular memes in this case in this district. Even Ms. Rocketto and Mr. Cotler did not testify that they saw the particular memes at issue. They saw text by -- vote by text memes, but they didn't see Mr. Mackey's memes, they didn't testify. And they didn't testify that they saw them in this district. And that may seem hyper technical, but we're talking about jurisdiction on which the Court's construe very strictly.

And so what you're left with in terms of venue for this case now, now that the record is complete, is that when you -- is that because of technology, advances technology essentially even if you're not targeting a particular person in a district, even if there is not a point to point communication with someone in the district, as soon as you tweet something or send something that has national reach, the

government can choose where to bring the case for venue purposes. Well, first of all, we've had advances in technology for at least a decade, 15 years, and no court has ever held that successfully, and, second, that can't be the law. It can't be that technology undoes literally 200 years of developing jurisprudence about the requirement that prosecutors pick the right venue, and I understand that because of all the things we're talking about, how interesting some of the issues are in this case, that venue seems to be somewhat technical and somewhat -- well, I'll leave it at that, somewhat technical.

THE COURT: The only thing that I'll say about these issues is I'm not sure that it's appropriate for me to make these decisions. I think that the -- you know, you made the fair warning arguments in the application to Judge Garaufis and I think these are really questions that are probably appropriate on appeal rather than on a motion -- I mean, the evidentiary question surely is something that I can consider whether there was sufficient evidence of a conspiracy, but the question of venue I think is not an appropriate one to review on a post-trial motion. I think that's an appellate issue.

MR. FRISCH: Well, I have to make my record on that. Number one, Judge Garaufis said that his issue was limited to the defendant's pretrial motion to dismiss and that the government still had to prove venue at trial.

THE COURT: But you're just talking about whether there was sufficient proof of venue, whether the evidence -- I can review the evidence on it.

MR. FRISCH: Well, that's true. And, second, let's just say hypothetically that the Second Circuit agrees with the defense that there was no venue here and that all or part of Judge Garaufis' ruling was wrong, I don't think you're bound to follow it if it's wrong.

In any event, they didn't prove what he said they had to prove, which is, they have to prove that the images were viewed in the Eastern District. I think of all the issues in this case, and there's a lot of them, there's a lot here, right? If the Court sustains the conviction and this case goes up, there's an awful lot for the Second Circuit to look at but I think venue is going to be number one on their list. I'm humble about what the circuit might or might not do or consider important, but I think it's the big one of all the big issues in this case.

THE COURT: Do you think that Judge Garaufis' -- that that was the only way they could do it if somebody --

MR. FRISCH: No. I think to the extent Judge Garaufis said -- and there's a line in there, to the extent that Judge Garaufis' position is in the digital age when you put something out nationwide the prosecutor can pick what district to use, whether or not it's targeted, whether or not

there is a point to point communication, whether or not it's a financial crime, to the extent that he said that and that's his position as to how you could have venue, respectfully, great respect for Judge Garaufis, he has that wrong. No court has ever held that. I don't think any court ever will.

But in any event, he did say the government needs to prove that the images were viewed in the Eastern District and there is no evidence that these images were viewed in the Eastern District or whatever images were seen by Ms. Rocketto and Mr. Cotler were seen in this district.

THE COURT: All right. Do you have anything you want to say about venue.

MR. PAULSEN: Your Honor, I would just add what I believe your Honor had focused on is that, we had proposed four different ways to establish venue. Judge Garaufis endorsed three of them. One of which I think was the most straightforward one, the fact of the electronic communications passing through the district. We presented four separate witnesses to make sure that was belt and suspenders as clear as possible. We believe the rest of the evidence also met the other standards, but I think venue was factually clearly proved as we articulated it in our brief.

THE COURT: I just have a couple of factual questions about, I understand your arguments about the evidence of a conspiracy. I just want to make sure I

understand factually something about the chat groups.

So GX200 is the War Room, the Mad Man Group or Microchip.

MR. PAULSEN: It's none of those, your Honor.

THE COURT: What is it?

MR. PAULSEN: GX200 was a compilation of various direct messages, so one on ones involving the defendant or in some cases some smaller groups that had two or three or four individuals in it. They were broken up actually by letters, but thematically I think it was 200-A, dash B but then they were combined into one. I believe when we cited it we used the letters, when Mr. Frisch cited it he just said 200 and then the raw page number. We can provide you though both those versions if your Honor needs them.

THE COURT: Okay, it's just a little bit confusing. GX400 is the War Room?

MR. PAULSEN: That's the War Room, your Honor.

THE COURT: GX410 is Micro Chat.

MR. PAULSEN: Yes, your Honor.

THE COURT: GX430 is the Mad Man chat?

MR. PAULSEN: I believe it's -- I think it's 420 and 430 are the two Mad Man, one of them they kind of reconstituted themselves and I think one was called Mad Man 1 and Mad Man 2.

THE COURT: Okay. Then the just in terms of the

dates that Mr. Mackey was a member of those chat groups, is it any date that he wasn't suspended?

MR. PAULSEN: Yes, your Honor. So the War Room is the one that he was in most consistently.

THE COURT: Was he a member of the War Room from October 27th to November 2nd?

MR. PAULSEN: Yes. But not the other two.

THE COURT: Not the other two. And Micro Chat he didn't rejoin after he got suspended; is that right?

MR. PAULSEN: He did not rejoin the Micro Chat. He did rejoin the War Room -- I'm sorry, the Mad Man chat but at the very end, about a week after the election.

THE COURT: Okay. Just on that question, do you differ as a factual matter with the dates that he was suspended?

MR. FRISCH: I don't have those dates in mind. I can sort of get the minutes and go back and look, but I don't have those exhibits or those dates in mind.

THE COURT: Okay.

MR. FRISCH: While we're talking about it, can I make one other -- I don't mean to -- if I can address one other issue.

As I look back and try to put my appellate hat on and look at this case, I think venue is the biggest problem the government had. There's a lot of problems here, I don't

mean to -- I'm not saying that to be theatrical, I think there's a lot of problems here.

I think, number one, because it affects so much going forward in the Circuit and in the United States, venue is number one.

I think number two is the insufficiency of the evidence. And, you know, because the courts, district judges and appellate judges defer to the finder of fact and try to look at the light most favorable to the government, it's difficult to prevail when evidence is insufficient -- on a claim that is evidence insufficient, but I think it really is insufficient here. And I think it's insufficient because the entirety of the relationship between Mr. Microchip and Mr. Mackey is, because they were sometimes in the same chat room, they don't know each other, they didn't have any other direct communications and Mr. Mackey was not present when the chatters discussed these memes nor did he share those particular memes. There's just no evidence that he knew about this criminal conspiracy. And then they bring us Tia, whatever her name was, but T-I-A, Tia, and her meme, we don't know where she got it from, she wasn't part of that Micro chip chat, whatever the right way to describe that chat is and it was automatically sent to Mr. Mackey's avatar because she mentioned his name. That's their evidence of how Mr. Mackey participated in a conspiracy by sharing these three memes.

The most you could say, if you want to be generous to the government, is that there's an inference of conspiracy, but it's equal to or outweighed by the inference of shit posting. I get that insufficiency of the evidence is a difficult thing to show after a jury has found the defendant guilty, but, man, I think we've got it. I think the evidence here is insufficient.

THE COURT: All right. I understand your arguments and I'm taking them seriously. I do want to, just on this question of things that are sealed, I know I'm still waiting for a letter from you -- I don't know if you want to address it without --

MR. FRISCH: To be honest, I spent my weekend preparing for today --

THE COURT: Sure, that's fine.

MR. FRISCH: -- and I'm going to look at those letters this afternoon.

THE COURT: Okay.

MR. PAULSEN: Your Honor, can I add one more thing before we move off the substance of this?

THE COURT: Yes.

MR. PAULSEN: I think my colleagues are more generous than I am about this, I've been rather surprised at the intensity of the accusations that were made toward us in this. I think they said there was a scheme to defraud the

defendant, that almost everything we did was dripping with bad faith.

As Mr. Gullotta noted, we endeavored to turn over things quite early in this case to give him nearly everything we had and I think -- I thought we were dealing at a collegial way with him. I've been rather surprised by the venomous accusations we've received here, and I would just -- to the extent to make the record clear, we did not in any way commit a fraud on the defendant, on the Court. We tried to play this as straight as possible and we are dismayed at the way in which he's characterizing this case.

THE COURT: These are extremely serious accusations and may warrant if -- I don't know if you've referred it to the grievance committee but, you know, if you're making those accusations I think the government is entitled to respond and I really haven't given you much chance to do that.

Is there something else you want to say about it?

MR. PAULSEN: No, your Honor. We're trying to provide the facts so your Honor can decide, but the venom that's been used has been shocking to us.

MR. FRISCH: I stand by it a hundred percent and I take this job very seriously, as I'm sure --

THE COURT: I have to say --

MR. FRISCH: I --

THE COURT: -- I think everybody in the courtroom

takes the job seriously.

MR. FRISCH: I appreciate that.

THE COURT: And I think you have to be careful when you are leveling accusations of this kind at your adversaries. If you think that's -- I'm not telling you can't do it, but it is -- I mean -- they are pretty intense accusations and I understand that you stand by them.

MR. FRISCH: I assure your Honor, I assure your Honor that I don't make allegations of this sort without really thinking it through and vetting it and making sure I'm confident in my position and I stand by it.

THE COURT: Okay. The second question I have is with respect to the sealed proceeding. There has been references to it in some of the submissions. My question is, does it have to be sealed still and if portions -- or can portions of it be redacted if there's some concern about some of the content of it? If you want to think about that, you can surely think about it and let me know. It seems to me that the entire thing doesn't have to be sealed. It struck me, I can't remember who the submission it was, that somebody might have intended to refer to that, the things that led up to the -- that necessitated that sealed proceeding. So if you can let me know, can you let me know tomorrow?

MR. PAULSEN: Yes, your Honor. We did refer to it in our letter as the portion that we thought still should be

under seal because your Honor placed that entire proceeding under seal. But I suspect we agree that we don't think it needs to be under seal or at least the majority does not need to be.

THE COURT: I don't know if you have a position on it?

MR. FRISCH: You know, I've begun to think about it but let me address the sealing issues, this one and the others this afternoon and I'll let the Court know.

THE COURT: All right. I was going to suggest that you could see if you agreed on anything, but I think that's probably not going to work.

Give me just one second.

(Pause in proceedings.)

THE COURT: I think Probation Department has completed the presentence report.

MR. BUFORD: Yes.

THE COURT: And I think it might have mooted whatever your concern was with regard to information in the presentence report, but...

MR. FRISCH: I don't think so. To be honest, I didn't look yet at the PSR with care. I don't think it moots it, but we're going to provide and we have ready to provide to the officer certain redacted documents. We'll do that very shortly.

THE COURT: All right. Anything else?

MR. BUFORD: Not from the government, your Honor.

THE COURT: Is there still an open question about that, if -- I think probation responded to your letter to me about certain steps you wanted them to take so I don't think there's anything for me to decide.

MR. FRISCH: There is nothing for you to decide on that.

THE COURT: Okay. Thanks so much everybody.

(Matter concluded.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ Georgette K. Betts — September 18, 2023

GEORGETTE K. BETTS — DATE